

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	CSR 8340-E
Time Warner Cable, Inc, on behalf of its	)	CSR 8344-E
subsidiaries and affiliates	)	CSR 8345-E
	)	CSR 8346-E
Petitions for Determination of Effective	)	CSR 8347-E
Competition in Communities in New York	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 20, 2016      Released: January 21, 2016**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc. (“Time Warner” or the “Company”) has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that the Company is subject to effective competition in the communities listed on Attachment A (the “Communities”). Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and that it is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). One Community in CSR 8340-E, the Village of Maybrook, New York (the “Village”), filed a letter opposing a finding of effective competition there.<sup>3</sup> Time Warner filed a reply.<sup>4</sup> After Time Warner filed its Reply, the Commission asked the Company to clarify certain inaccurate numbers submitted in its petition.<sup>5</sup> Time Warner corrected the inaccurate numbers by submitting two letters.<sup>6</sup> In its first letter, the Company also requested to withdraw the Village of Red Hook (NY0477) from consideration in CSR 8340-E. We grant Time Warner’s request to withdraw Red Hook.

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as competing provider effective competition.<sup>7</sup> Accordingly, in the absence of a demonstration to the contrary, the Commission now

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Letter from Richard B. Golden, Esq., Burke, Miele & Golden, LLP, counsel for the Village of Maybrook, to Chief, Media Bureau, FCC, dated July 13, 2010 (the “Letter”).

<sup>4</sup> Reply, dated October 7, 2010.

<sup>5</sup> Letter from Steven A. Broecker, Esq., Senior Deputy Chief, Policy Division, Media Bureau, to Craig A. Gilley, Esq., Fleischman and Harding LLP, counsel for Time Warner, dated Nov. 15, 2010; E-Mail from John Berresford, Commission Attorney, to Mr. Gilley, dated 10:35 A.M., March 15, 2011.

<sup>6</sup> Letter from Mr. Gilley (of Edwards Angell Palmer & Dodge LLP) to Mr. Broecker, dated March 7, 2011; E-Mail from Mr. Gilley to Mr. Berresford, dated 10:42 A.M., March 15, 2011.

<sup>7</sup> See *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (“*Effective Competition Order*”).

presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>8</sup> For the reasons set forth below, we grant Time Warner's petitions.

## II. THE COMPETING PROVIDER TEST

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>9</sup> This test is referred to as the "competing provider" test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.

### A. The First Part

4. The first part of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.<sup>10</sup> As explained in the *Effective Competition Order*, "we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH, presumptively satisfies the" first part of the test for competing provider effective competition, absent evidence to the contrary.<sup>11</sup> The Village argues that Time Warner has not satisfied the first part of the competing provider effective competition test because Time Warner has not shown that Maybrook households are reasonably aware of DBS providers' service availability, and because Time Warner has only provided cursory statements that DBS providers advertise nationally, regionally and locally.<sup>12</sup> Without more substantive evidence, the Village's arguments fail to rebut the presumption of competing provider effective competition because, under the new presumption, reasonable awareness of the availability of DBS providers, DIRECTV and DISH, is presumed. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Time Warner and the Village, we thus find that the first part of the test is satisfied.

### B. The Second Part

5. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.<sup>13</sup> As explained in the *Effective Competition Order*, "[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD."<sup>14</sup> The Village argues that Time

<sup>8</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

<sup>9</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>10</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>11</sup> *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

<sup>12</sup> Letter at 2. The Commission previously presumed that DBS service was actually available if households in the franchise area were made reasonably aware of the service's availability. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5661, ¶ 32 (1993).

<sup>13</sup> 47 C.F.R. § 76.905(b)(2)(ii).

<sup>14</sup> *Effective Competition Order*, 30 FCC Rcd at 6581-82, ¶ 9.

Warner has not satisfied the second part of the competing provider effective competition test for several reasons. First, the Village argues that DBS provider subscription in Maybrook is barely over the 15 percent statutory requirement.<sup>15</sup> This first argument is irrelevant because any subscription level in excess of the 15 percent threshold meets the statutory test set forth above. Second, the Village asserts that the subscriber tracking reports from the Satellite Broadcasting and Communications Association referenced in Time Warner's petition do not take into account any cancellations that occurred between the time the reports were purchased and the date Time Warner's petition was filed.<sup>16</sup> Time Warner responds, and we agree, that the Village provides no evidence that any cancellations actually occurred or were significant enough in number to undermine the DBS penetration figures provided in the Petition.<sup>17</sup> Third, the Village argues that more accurate census data is available and that Time Warner should submit a more accurate count of whether the number of households subscribing to the programming services of competing DBS services exceeds 15 percent.<sup>18</sup> Time Warner responds, and we agree, that its use of census household figures for each community, including Maybrook, was proper and fully consistent with Commission precedent.<sup>19</sup> For the above reasons, the arguments put forth by the Village fail to rebut the presumption of competing provider effective competition. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Time Warner and the Village, we thus find that the second prong of the test is satisfied.

### III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc., **ARE GRANTED** as to the Communities listed on Attachment A hereto.

7. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachment A **IS REVOKED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>20</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>15</sup> Letter at 2.

<sup>16</sup> *Id.*

<sup>17</sup> Reply at 3.

<sup>18</sup> Letter at 2.

<sup>19</sup> Reply at 3.

<sup>20</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 8340-E, CSR 8344-E, CSR 8345-E, CSR 8346-E, CSR 8347-E

## COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

Proceedings & Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
<b>CSR 8340-E</b>				
Crawford Township	NY0514	29.89%	2707	809
Delaware Township	NY0488	45.19%	956	432
Highland Township	NY0597	38.17%	951	363
Jeffersonville Village	NY0161	17.90%	162	29
Maybrook Village	NY0547	15.34%	1043	160
Montgomery Village	NY0492	16.87%	1304	220
New Windsor Village	NY0246	16.28%	8396	1367
Otisville Village	NY1088	17.98%	356	64
Rockland Township	NY0225	49.87%	1560	778
Shandaken Town	NY0556	20.51%	1463	300
Walden Village	NY0513	16.57%	2197	364
Wallkill Township	NY0717	18.85%	8866	1671
Washingtonville Village	NY0503	17.69%	1984	351
<b>CSR 8344-E</b>				
Chester Township	NY1249	47.34%	1280	606
Hague Township	NY1247	28.03%	371	104
Horicon Township	NY1250	59.97%	642	385
Port Henry Village	NY1120	15.68%	491	77
Schroon Township	NY1150	55.36%	737	408
Ticonderoga Township	NY1538	24.85%	2028	504
Whitehall Village	NY0098	18.57%	1104	205
<b>CSR 8345-E</b>				
Fort Plain Village	NY0254	22.92	960	220
<b>CSR 8346-E</b>				
Day Town	NY1562	47.91%	382	183
Edinburg Town	NY1561	25.08%	598	150
<b>CSR 8347-E</b>				
Cambridge Village	NY0992	17.35	755	131
Greenwich Village	NY0995	15.99	788	126
Hoosick Falls	NY1118	21.71	1382	300
Nassau Township	NY 1313	28.58	1851	529

\*CPR = Percent of competitive DBS penetration rate.